No.

IN THE

Supreme Court of the United States

LEON AKSELRAD,

Petitioner,

v.

CITY OF PHILADELPHIA, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED APRIL 29, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1178

LEON AKSELRAD,

Appellant

v.

CITY OF PHILADELPHIA; DEPT OF AVIATION;
ED RENDELL, MAYOR; MARY ROSE LONEY

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 96-cv-05192)
District Judge: Honorable James McGirr Kelly

Submitted Under Third Circuit LAR 34.1(a)
February 12, 1999

Before: *CHIEF JUDGE* BECKER, MCKEE
AND COWEN, *CIRCUIT JUDGES*

(Filed **APR 29 1999**

OPINION

Appendix A

PER CURIAM

Leon Akselrad appeals pro se the District Court's grant of the defendants' motion for judgment on partial findings under FED. R. CIV. P. 52(c), and its subsequent denial of Akselrad's motion for reconsideration. We will affirm.

Akselrad, a former employee of the city of Philadelphia, filed a civil suit alleging various violations of Title VII of the Civil Rights Act of 1964, theft of his invention, unjust enrichment, wrongful termination, denial of union representation, and interference with his right to seek a position with the union. After the District Court denied the defendants' motion for partial summary judgment, the case proceeded to trial without a jury. Upon completion of Akselrad's case-in-chief, the District Court granted the defendants' motion for judgment on partial findings, finding that Akselrad had failed to prove any of his claims. Akselrad then filed a motion seeking reconsideration of the ruling as to the unjust enrichment claim. The motion was denied. Akselrad now appeals the District Court rulings as they apply to the unjust enrichment claim.

The District Court had federal question jurisdiction over the Title VII claims, *see* 28 U.S.C. § 1331, and supplemental jurisdiction over the various state-law claims, *see* 28 U.S.C. § 1367(a). We exercise appellate jurisdiction pursuant to 28 U.S.C. § 1291.

In reviewing the District Court's grant of judgment on partial findings, factual findings are reviewed for clear error, FED. R. CIV. P. 52(a), and conclusions of law are reviewed

de novo, *MacDraw v. The CIT Group Equip. Fin., Inc.*, 157 F.3d 956, 960 (2d Cir. 1998). Under the clearly erroneous standard, "an appellate court may not substitute its findings for that of the District Court." *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501, 507 (3d Cir. 1995). Instead, the reviewing court must give due deference to the District Court's credibility determinations, and is "limited to making an assessment of whether there is enough evidence on record to support [the factual] findings." *Id.*

As an employee of the city of Philadelphia, Akselrad worked as an electronics technician for the Philadelphia International Airport. From the end of 1993 to March 1994, Akselrad designed and built an alarm device intended for use at the terminal gates. Akselrad installed the device at one gate, and subsequently removed it upon the request of his supervisor. Also in 1994, Akselrad's second-level supervisor and another electronics technician developed an alarm device that was installed throughout the airport. Akselrad claims that through these two employees, his employer "pirated" his design without compensating him for its value.

Under Pennsylvania law, to recover for unjust enrichment, Akselrad must show

> benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.

Schenck v. K.E. David, Ltd., 666 A.2d 327, 328 (Pa. Super. 1995). The District Court found that Akselrad's device was not useful because it did not comply with FAA regulations, and thus Akselrad had not conferred a benefit on the defendants. The District Court also found that to the extent Akselrad helped solve a problem with an existing device, it was done as part of his job as an electronics technician and there is no injustice in an employer retaining the benefit of its employees' work.[1] Reviewing the record and giving due deference to the District Court's credibility determinations, we find ample evidence to support these findings. Akselrad's apparent testimony to the contrary does not render the District Court's findings clearly erroneous when, as in this case, the findings are based on coherent and plausible testimony. *See United States v. Igbonwa*, 120 F.3d 437, 440 (3d Cir. 1997).

Akselrad claims that his employer's reimbursement of $48 for expenses incurred during the development of the device created a quasi-contract. This argument is without merit. A quasi-contract "imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement when one party receives an unjust enrichment at the expense of another." *Salvino Steel & Iron Works, Inc. v. Fletcher & Sons, Inc.*, 580 A.2d 853,

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1. There is evidence that in 1995 Akselrad completed a "Disclosure Document" form from the Department of Patent and Trademark Office, but there is no evidence that Akselrad applied for or obtained a patent during the time in question. Thus, the parties' arguments regarding "shop rights" are inapposite. *See Aetna-Standard Eng'g Co. v. Rowland*, 493 A.2d 1375, 1378-79 (Pa. Super. 1985) (defining "shop right" as an employer's license to use an employee's patented invention).

856 (Pa. Super. 1990), *appeal dismissed*, 601 A.2d 806 (Pa. 1992). As indicated above, the District Court's finding of no unjust enrichment was not clearly erroneous. Akselrad also claims that he developed the device, in part, on his own time. Such voluntary use of personal time does not, in itself, make it inequitable for an employer to retain the benefit of the additional work.[2]

Accordingly, we will affirm the District Court's judgment on partial findings.

TO THE CLERK:

Please file the foregoing opinion.

2. To the extent Akselrad also challenges the District Court's evidentiary rulings, the District Court did not abuse its discretion in excluding technical documentation of Akselrad's design. *Ryder v. Westinghouse Elect. Corp.*, 128 F.3d 128, 132 (3d Cir. 1997). The District Court ordered the pre-trial disclosure of Akselrad's exhibits, and informed him of the possible exclusion of any non-disclosed exhibits. *See Akselrad v. City of Philadelphia*, E.D. Pa. 96-cv-5192, ORDER date June 2, 1997. Furthermore, to the extent Akselrad was concerned with the confidentiality of the documents, there is no indication that he sought a protective order pursuant to FED. R. CIV. P. 26(c).

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1178

LEON AKSELRAD,

Appellant

v.

CITY OF PHILADELPHIA; DEPT OF AVIATION;
ED RENDELL, MAYOR; MARY ROSE LONEY

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 96-cv-05192)
District Judge: Honorable James McGirr Kelly

Submitted Under Third Circuit LAR 34.1(a)
February 12, 1999

Before: *CHIEF JUDGE* BECKER, MCKEE
AND COWEN, *CIRCUIT JUDGES*

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here

Appendix A

ORDERED AND ADJUDGED by this court that the judgment of the district court entered January 27, 1998 be and the same is hereby affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

DATED: **APR 29 1999**

APPENDIX B — SOCIAL MERIT

SOCIAL MERIT

TO PROMOTE PUBLIC SAFETY AND SECURITY

TO PROMOTE INVENTIVENESS AND COMPENSATION FOR INVENTORS

ALLOW WORKERS INCENTIVES TO BE INVENTIVE

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 26, 1998 AND FILED JANUARY 27, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-CV-5192

LEON AKSELRAD,

Plaintiff,

v.

CITY OF PHILADELPHIA, et al,

Defendants.

MEMORANDUM AND ORDER

J. M. KELLY, J. **January 26, 1998**

This is a civil action that was tried without a jury. After I bifurcated the trial, Plaintiff Leon Akselrad ("Akselrad") presented his case-in-chief on liability. At the close of Akselrad's case, Defendant City of Philadelphia ("the City") moved for judgment on partial findings pursuant to Fed. R. Civ. P. 52(c).[1]

1. Akselrad included Mayor Edward G. Rendell and former Aviation Division Director Mary Rose Loney as Defendants. Akselrad did not prove that these officials had any personal involvement in this case. For convenience, I shall refer to all Defendants as "the City."

Appendix C

Rule 52(c) states, in pertinent part:

> **Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim . . . that cannot under the controlling law be maintained . . . without a favorable finding on that issue

Under Rule 52(c) the court may dismiss an action that is being tried without a jury, when it is clear that the nonmovant failed to prove its case. *Fechter v. Connecticut Gen. Life Ins. Co.*, 800 F. Supp. 182, 196 (E.D. Pa. 1992). Unlike a Rule 50 motion for judgment as a matter of law, the court does not evaluate whether the nonmovant made out a prima facie case and does not draw any special inferences in the nonmovant's favor. *Id.* (citing *Beissinger v. Rockwood Computer Corp.*, 529 F. Supp. 770, 775 n.4 (E.D. Pa. 1981)). Instead, the court weighs the evidence "and decides for itself where the preponderance lies." *Fechter*, 800 F. Supp. at 196; *see also* 9A Wright & Miller, *Federal Practice and Procedure*: Civil 2d § 2573.1 (1995).

In accordance with Fed. R. Civ. P. 52, the following opinion shall constitute the Court's findings of fact and conclusions of law.

BACKGROUND

Akselrad was hired as an electronics technician at the Philadelphia International Airport in 1989. The City

terminated him in 1992, but he was reinstated by the Civil Service Commission. The Commission found that Akselrad was subjected to religious and other forms of harassment. Akselrad's employment was again terminated in October, 1995.

Akselrad claims that since his return to work he was subjected to harassment, disparate treatment and ultimately termination, because of his religion and because the City wanted to steal a device that he had invented. The City claims that Akselrad was terminated for insubordination and as a result of his employment record.

Akselrad's testimony was frequently the only evidence offered to support his claims. After reviewing the testimony of the other witnesses and the documentary evidence, I find that Akselrad's testimony was not credible on many points.

DISCUSSION

As a pro se plaintiff, Akselrad's pleadings are held to a more liberal standard than pleadings drafted by a lawyer. *See Gibbs v. Roman*, 116 F.3d 83, 86 (3d Cir. 1997) (*citing Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Considering the complaint, EEOC charge and pre-trial submissions, Akselrad plead the following claims:

1. The City violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (1994) ("Title VII"), by subjecting Akselrad to disparate treatment because of his religion.

2. The City violated Title VII by subjecting Akselrad to a hostile work environment because of his religion.

3. The City violated Title VII by subjecting Akselrad to a sexually hostile work environment.

4. The City violated Title VII by retaliating against Akselrad for filing Civil Service Commission and EEOC charges.

5. The City discharged Akselrad in order to steal a device he invented.

6. The City denied Akselrad union representation and interfered with his right to seek union office.

7. The City wrongfully stole Akselrad's invention.

8. The City was unjustly enriched and is liable to Akselrad in quasi-contract.

I. ***DISCRIMINATION CLAIMS***

Akselrad claims that he was subjected to disparate treatment and a hostile work environment because of his religion. He also claims that he was sexually harassed and subjected to retaliation. Akselrad also alleges that his termination was part of a conspiracy to steal a device he had invented. The City maintains that Akselrad was terminated for insubordination and a poor employment record.

Appendix C

A. *Disparate Treatment on the Basis of Religion*

Akselrad claims that the City denied him training, tools, seniority privileges and ultimately terminated his employment because of his religion. Akselrad had the burden of proving, by a preponderance of the evidence, that the City treated him less favorably than other employees because of his religion.

Disparate treatment cases are often analyzed through a framework of inferences and presumptions. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*; 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). These shifting burdens of proof are less important on a Rule 52(c) motion. The decision that the Court must make in this context is basically the same decision that must be made when an employee has proven a prima facie case, and the employer has answered by producing evidence of legitimate nondiscriminatory reasons for its adverse employment action. The Court must "decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him] because of his [religion].' " *St. Mary's Honor Ctr.*, 509 U.S. at 511 (quoting *Burdine*, 450 U.S. at 253).[2]

2. Regardless of how the evidence is framed, judgment on partial findings may often be inappropriate in employment discrimination cases. If a plaintiff proves a prima facie case, the court expects the defendant to "come forward" with evidence of legitimate nondiscriminatory reasons for its employment action — effectively precluding judgment on partial findings. In this case,

(Cont'd)

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1. *Denial of Training, Tools and Seniority Privileges*

Akselrad did not prove that he was treated differently in his terms and conditions of employment because of his religion. Akselrad produced evidence that showed that the airport electronics shop was not always a pleasant place to work. Several coworkers testified that they were displeased with their training and their access to tools and parts. Akselrad also adduced evidence that suggested that his supervisor did not always assign work according to seniority. Akselrad did not, however, prove that he was treated differently than other employees.

At most, the evidence shows that the electronics shop was poorly managed. Poor management is not prohibited by Title VII. Title VII only requires that employers make employment decisions without regard to protected characteristics such as religion. Akselrad proved that the City did not provide sufficient training, tools or parts to any of

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(Cont'd)
however, the Plaintiff decided to call his supervisors and coworkers in his case-in-chief. Through these witnesses, the Plaintiff and Defendant elicited a large amount of evidence to support the Defendant's reasons for its employment decision. Akselrad did not present any evidence that supported his claim that the City's reasons were a pretext for discrimination. In other words, even if the City offered no further evidence I would find in its favor on these claims. Therefore, judgment on partial findings is appropriate. *See Scales v. George Washington Univ.*, Civ. A. No. 89-0796, 1993 WL 304016, at *7 (D.D.C. July 27, 1993) (granting judgment on partial findings because the "employer's legitimate, nondiscriminatory reasons . . . were presented during the Plaintiff's case.").

its electronics technicians. Thus, the City did not violate Title VII.

2. *Termination*

Akselrad did not prove that his termination was motivated by discriminatory animus. The City terminated Akselrad because of his employment record and because he disobeyed a written warning that he was not to contact contractors.

Akselrad had an abysmal employment record. He was formally disciplined at least ten times since his reinstatement in 1993. Akselrad ignored general airport policies, as well as specific instructions. He had great difficulty interacting with other airport staff. At various times, other employees complained that Akselrad made inappropriate racial and sexual remarks and that he made them feel threatened. On at least one occasion, he caused major damage to airport property. In January, 1995, Akselrad's security clearance was revoked on the recommendation of an FAA agent who found that he was a threat to airport security. This meant that Akselrad only had access to the public areas of the airport. Akselrad repeatedly ignored warnings that his conduct would lead to the termination of his employment.

Akselrad's explanations of his record were not convincing. For example, he admitted that a female employee informally complained that he was sexually harassing her. Akselrad did not deny repeatedly asking the woman to go out, instead he explained that he only did this to rebut his male supervisor's sexual advances and to prove that he was a heterosexual.

Appendix C

In another incident, Akselrad received a written warning that stated "[I]t is not within your job scope to direct contractors and any further contact with this contractor on this matter is prohibited." The shop supervisor testified that he explained to Akselrad that he was not to contact any contractors. In April, 1995, Akselrad contacted a contractor that had sold display monitors to the airport. He requested that the contractor send remote controls to his home address. When his supervisor learned of the request, Akselrad was terminated. Akselrad testified that he did not understand the warning.

While Akselrad referred to a large conspiracy directed at him, he did not offer any credible evidence that suggested that the reasons that the City gave for his termination were a pretext for discrimination.[3] I find that Akselrad was terminated for insubordination and as a result of his employment record, and not because of his religion. Therefore, the City's motion for judgment on partial findings is granted with respect to the disparate treatment claim.

B. *Hostile Work Environment on the Basis of Religion*

Akselrad claims that he was subjected to a hostile work environment because of his religion. Title VII prohibits harassment based on religion, or other protected

3. Akselrad alleged that supervisors and coworkers harassed him by making anti-Semitic remarks. If there was evidence to support these allegations, I would hesitate to grant judgment on the disparate treatment claim at this stage. As discussed below, however, I find that Akselrad's allegations of harassment and anti-Semitic remarks are unfounded and that his testimony in this regard is not credible.

characteristics, that has the effect of creating an intimidating, hostile, or offensive work environment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986). To succeed on the hostile environment claim in this case, Akselrad had to prove: (1) he suffered intentional discrimination because of his religion; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected him; (4) the discrimination would detrimentally affect a reasonable person in the same position; and (5) the existence of respondeat superior liability. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990); *Goldberg v. City of Philadelphia*, No. 91-7575, 1995 WL 472108, at *7 (E.D. Pa. Aug. 9, 1995).

1. *Relevance of Harassment During First Term of Employment*

Akselrad's employment was terminated in January, 1992. The Philadelphia Civil Service Commission reinstated him in June, 1993, because it found that he had been subjected to religious and other forms of harassment. Throughout the trial, Akselrad referred to incidents that occurred during his first term of employment.

Akselrad cannot recover for harassment that occurred in 1992. Beyond the fact that the claim would likely be time barred, Akselrad sought and obtained relief for the 1992 termination. He was reinstated by the Civil Service Commission and, on appeal, he was awarded half of his back pay and full seniority. Akselrad was made whole for the 1992 termination.

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Evidence of harassment during Akselrad's first term of employment is relevant to this suit under Federal Rule of Evidence 401. Nevertheless, the main perpetrator of that harassment was terminated in 1993, for unrelated reasons. Akselrad had a different supervisor during most of his second term of employment. These facts, and the gap in time between the alleged incidents, reduces the weight of the evidence of harassment in 1992.

2. *Harassment During Second Term of Employment*

Akselrad claims that on at least four occasions, in 1993 and 1994, a supervisor harassed him by saying "Jew, Jew, Jew," and by making other anti-Semitic remarks. He also claims that several coworkers made similar remarks.

The only evidence that Akselrad presented to support his claim of religious harassment is his own testimony. Akselrad questioned every other witness about these claims, but none of them corroborated his testimony. Of particular importance is the testimony of Irene Snyder ("Snyder"). Snyder is currently the President of the union that represented Akselrad and she previously worked closely with him as a technician in the electronics shop. In general, Snyder's testimony was very favorable to Akselrad. She supported Akselrad's claims that electronics technicians did not have sufficient tools, parts or training. Nevertheless, Snyder testified that she did not hear anyone at the airport make anti-Semitic remarks towards Akselrad, or anyone else.

Around the same time that Akselrad complained that his supervisor was harassing him, he also complained that

passengers at the airport would bump into him and make anti-Semitic remarks. He suspects that these passengers were hired by his supervisors as part of their campaign of harassment. Akselrad also admitted that he has accused supervisors and coworkers at prior and subsequent jobs of harassing him by making anti-Semitic remarks.

After weighing the evidence, I find that Akselrad did not prove that his coworkers or supervisors made anti-Semitic remarks. Akselrad's testimony on this issue was not credible. Akselrad did not prove intentional discrimination. Therefore, the City's motion for judgment on partial findings is granted with respect to the religious hostile environment claim.

C. *Sexual Harassment*

Akselrad claims that his male supervisor sexually harassed him. He claims that on three or four different occasions, the supervisor made an obscene gesture and asked "what are you doing this weekend?" He also claims that the same supervisor suggested that Akselrad should be "friendly" to another male supervisor whom Akselrad believes to be homosexual. At trial, the accused supervisor denied making any of these statements. Once again, Akselrad's testimony was the only evidence offered to support his claim.

Title VII prohibits "unwelcome sexual advances that create an offensive or hostile working environment." *Meritor Sav. Bank*, 477 U.S. at 64. Akselrad did not specify whether he was claiming "quid pro quo" or "hostile environment" sexual harassment. Under either theory, the Plaintiff must prove that he suffered intentional discrimination because of

his sex. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1296 (3d Cir. 1997) (discussing quid pro quo theory); *Andrews*, 895 F.2d at 1482 (elements for hostile environment claim).

Whether a male can recover, under Title VII, for sexual harassment by another male is unsettled. *See Caldwell v. KFC Corp.*, 958 F. Supp. 962 (D.N.J. 1997) (discussing issue and citing cases). I need not discuss this complex legal issue. I find that Akselrad's uncorroborated allegation of sexual harassment is not credible. Akselrad did not prove that he suffered intentional discrimination because of his sex. Therefore, the City's motion for judgment on partial findings is granted with respect to the sexual harassment claim.

D. *Retaliation*

Akselrad claims that he was harassed and ultimately terminated in retaliation for filing Civil Service Commission and EEOC charges. As discussed above, Akselrad was terminated in January, 1992 and reinstated by the Civil Service Commission in June, 1993. While Akselrad cannot recover for the harassment he suffered in 1992, he could recover if he proved the City retaliated against him for protesting his termination.

Title VII prohibits discrimination against persons who oppose unlawful employment practices. 42 U.S.C. § 2000e-3(a) (1994). As discussed above, on a Rule 52(c) motion, the shifting burdens of proof that are usually used to analyze a retaliation claim are less important. In this context, the court must weigh the evidence and decide whether the

employee proved that his employer took adverse action against him because he opposed unlawful employment practices.

Akselrad did not prove that any of the adverse employment actions taken by the City were motivated by retaliatory animus. Akselrad stated his belief that he was treated less favorably than other employees because he had previously protested discrimination, but even he did not testify to any evidence or particular incidents that would suggest retaliation. Again, I find that Akselrad was terminated because of insubordination and a poor employment record. Akselrad did not offer any evidence that suggested that these reasons were a pretext for retaliation. The City's motion for judgement on partial findings is granted with respect to the retaliation claim.

E. *Discharge for Purpose of Stealing Invention*

Akselrad claims that his supervisors terminated his employment so that they could steal a door alarm circuit that he had invented. Again, I am satisfied that Akselrad was terminated for insubordination and a poor employment record. In addition, neither federal or state law would provide a cause of action under these facts.

There is no federal common law cause of action for wrongful termination. An employee must identify a constitutional or statutory right that provides protection from termination. No such federal right applies to the facts alleged by Akselrad.

Similarly, Pennsylvania law does not provide a general common law cause of action for wrongful termination. *Clay v. Advanced Computer Applications*, 559 A.2d 917, 918 (Pa. 1989). Exceptions to the "at-will" employment rule are recognized in only the most limited circumstances. *Paul v. Lankenau Hosp.*, 569 A.2d 346 (Pa. 1990). An employee protected by a collective bargaining agreement cannot maintain an action for wrongful discharge. *Quitmeyer v. SEPTA*, 740 F. Supp. 363, 367 (E.D. Pa. 1990); *Phillips v. Babcock & Wilcox*, 503 A.2d 36, 37 (Pa. Super. 1986). If Akselrad believed that the City terminated him so that it could steal his invention, his recourse was to file a grievance under his collective bargaining agreement.[4]

The City's motion for judgment on partial findings is granted with respect to Akselrad's claim that the City terminated him in order to steal his invention.

II. *INTERFERENCE WITH UNION RIGHTS*

Akselrad claims that on at least one occasion when he was disciplined, he requested the presence of a shop steward and his supervisor denied his request. Akselrad also claims that the City interfered with his campaign for the office of union president.

The only possible sources for the rights Akselrad claims in this part of the case are the collective bargaining agreement

4. The fact that Akselrad may have withdrawn his union membership is not relevant. The union represents all employees in a bargaining unit, whether or not they are union members. Akselrad was part of the bargaining unit.

between his employer and his union, and the National Labor Relations Act. To the extent Akselrad is claiming violations of the collective bargaining agreement, his remedy was to grieve the violation under the procedures set out in that agreement. To the extent Akselrad is claiming an unfair labor practice, the National Labor Relations Board is the proper forum for that complaint. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). This Court does not have jurisdiction to decide Akselrad's labor relations claims.

I have considered Akselrad's claim that the City's actions were part of a campaign of harassment. With regard to Akselrad's claim that he was denied the presence of a shop steward, the City maintains that the situation was one in which an employee does not have a right to have a shop steward present. I find that the actions taken by Akselrad's supervisor were motivated by an honest belief that he did not have to provide a shop steward when he issued a verbal warning. Akselrad did not prove that this decision was motivated by discriminatory animus or any other illicit motive.

Akselrad also claims that the City harassed him by denying him access to the non-public areas of the airport during his campaign for union president. Prior to the campaign, Akselrad's security clearance was revoked on the recommendation of an FAA agent who believed that he was a danger to airport security. I find that the denial of access to the non-public areas of the airport was based on Akselrad's lack of security clearance, and not on discriminatory animus or any other illicit motive.

Appendix C

III. *INTELLECTUAL PROPERTY CLAIMS*

In 1993 and 1994, Akselrad designed some type of alarm device for airport gates. He unilaterally decided to install it at gate C-1 of the Philadelphia International Airport for 'testing and perfection.' The device was a local alarm that did not report security breaches to police dispatch as required by FAA regulations. Akselrad's supervisors received complaints about the device and ordered him to remove it approximately two months after it was installed. Akselrad's device was not used anywhere other than gate C-1.

Initially, Akselrad did not keep his device a secret, he discussed it with co-workers and he admits that some of them provided useful suggestions. While Akselrad expended some of his own time and money to develop his device, he admits that he also used City time and materials. Akselrad also admits that no one at the airport ever promised to pay him for this, or any other invention.

In late 1994, another electronics technician, Dennis Edelman ("Edelman"), and his supervisor, Robert Cusick ("Cusick"), developed a door alarm circuit that was installed throughout the airport. Edelman testified that he had seen Akselrad's device, but the one that he created is different. Edelman, and another employee, Dave Enders, testified that designing or modifying an electronic device to solve a problem was part of their job. Edelman testified that the only additional compensation he received for his work was an "outstanding employee" pin. Akselrad claims that Edelman and Cusick stole his idea.

Appendix C

A. *Theft of Intellectual Property*

Akselrad claims that the City violated his patent, property and contractual rights by "pirating" his invention. Akselrad's claim fails for a number of reasons.

If Akselrad invented something novel and useful, he did not reveal it to the Court. Akselrad refused to submit any evidence of how his device worked, how it was unique, or how it was useful to the airport. Despite requests from the Defendant, Akselrad refused to submit a schematic drawing or similar evidence during discovery or trial. Akselrad cannot prove that he had any intellectual property right, or that the City stole his invention, without submitting evidence of what it is he claims to have invented.

In addition, Akselrad did not identify a source for the rights he claimed. Akselrad cannot claim protection under the Patent laws because he has never held a patent on his device. *See* 35 U.S.C. § 281 (1994). Akselrad did not prove that he had any contact with the U.S. Patent Office until November, 1997. Further, Akselrad did not have any express or implied contractual right to compensation for devices that he invented while working for the City.

Akselrad did not prove that he created anything that would qualify as protectable intellectual property and he did not prove that the City violated any of his rights. At most, Akselrad proved that he modified an electronic device in order to solve a problem. Modification of electronic devices is part of the job of an electronics technician. The City's motion for judgment on partial findings is granted with respect to the claim for theft of intellectual property.

Appendix C

B. *Unjust Enrichment*

Akselrad seeks to recover the value of the benefits he believes he conferred on the City, under the equitable doctrine of Unjust Enrichment. He claims that the City received great benefits as a result of his inventive skill and that he should be compensated for his services.

In order to prevail on a claim of unjust enrichment, the plaintiff must show: (1) he conferred a benefit on the defendant and expected to be paid; (2) the defendant should reasonably have expected to pay; and (3) acceptance and retention of such a benefit without payment would be unjust. *Martz v. Kurtz*, 907 F. Supp. 848, 855 (M.D. Pa. 1995); *Styer v. Hugo*, 619 A.2d 347, 350 (Pa. Super. 1993).

Akselrad did not prove that he conferred a benefit on the City. The device that Akselrad created did not comply with FAA regulations, so it was not useful to the City. While Akselrad admits that his specific prototype was not useful, he claims that the City stole his idea. Again, it is impossible for Akselrad to prove that the City stole his idea without revealing or explaining the substance of the idea.

At most, the evidence showed that Akselrad helped to solve a problem with an electronic device. That was what he was paid to do. There is no injustice in allowing the City to retain the benefits of its employees' work. Akselrad did not prove any of the elements necessary to succeed on a claim of unjust enrichment. Therefore, the City's motion for judgment on partial findings is granted with respect to the unjust enrichment claim.

Appendix C

PLAINTIFF'S POST-TRIAL MOTIONS

After I took the City's Motion for Judgment on Partial Findings under advisement, the Plaintiff filed several motions.

I. *Motion to Classify Witnesses as "Quasi Experts"*

Akselrad requested that the Court consider his testimony, and the testimony of Dennis Edelman, "quasi expert" testimony. A witness is either a lay witness or an expert witness. Federal Rule of Evidence 702 provides that a witness qualified as an expert "by knowledge, skill, experience, training, or education" may testify to matters of a scientific or technical nature if that testimony will be helpful to the trier of fact. F.R.E. 702. A party must disclose the identity and opinions of an anticipated expert witness during discovery. Fed. R. Civ. P. 26(a)(2). In addition, at trial, a party seeking to have a witness qualified as an expert must identify the witness' area of expertise, ask that the court accept the witness as an expert, and allow their adversary to voir dire the witness. Akselrad did not comply with any of these rules. Akselrad and Edelman were not expert witnesses.

Nevertheless, I recognize that both witnesses have significant technical knowledge. Federal Rule of Evidence 701 provides that a lay witnesses may testify to opinions or inferences that are rationally based on their perception and helpful to a determination of a fact in issue. I considered the opinions expressed by Akselrad and Edelman in my decision and they did not cure the deficiencies in the Plaintiff's case.

Appendix C

II. *Motion for Trial Transcript at No Cost*

Akselrad sought a copy of the trial transcript "at no cost or at nominal cost as Plaintiff is in forma pauperis." At this point, the transcript request is only relevant to an appeal.

Under 28 U.S.C. § 753(f), a litigant seeking a transcript at public cost must establish: (1) in forma pauperis status; and (2) the appeal for which the transcript is sought is not frivolous.[5] *See Walker v. People Express Airlines, Inc.*, 886 F.2d 598, 602 n.5 (3d Cir. 1989).

During trial, the Defendant questioned the truthfulness of Akselrad's affidavit in support of his request to proceed in forma pauperis. The Court is deeply concerned with the veracity of Akselrad's claim of financial need. Nevertheless, based on the current record, I am not convinced that my original decision to allow Akselrad to proceed in forma pauperis should be changed.

Nevertheless, Akselrad is not entitled to a copy of the trial transcript at public cost. This trial was a string of uncorroborated accusations. In my view, Akselrad could not raise a substantial question on appeal. The motion for a copy of the trial transcript at no cost is denied without prejudice. If Akselrad subsequently points out a substantial question that may be raised on appeal, he may renew his request for a copy of the trial transcript.

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5. 28 U.S.C. § 753(f) provides:

> Fees for transcripts furnished . . . to persons permitted to appeal in forma pauperis shall . . . be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question).

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-CV-5192

LEON AKSELRAD,

Plaintiff,

v.

CITY OF PHILADELPHIA, et al,

Defendants.

ORDER

AND NOW, this 26th day of January, 1998, upon consideration of the Motion of Defendants City of Philadelphia, Mayor Edward G. Rendell and Mary Rose Loney for Judgment on Partial Findings, and Plaintiff Leon Akselrad's Motion to Classify Witnesses as "Quasi Experts," and Plaintiff's Motion for a Copy of the Trial Transcript at No Cost, and the responses thereto, it is ordered:

1. Defendant City of Philadelphia's Motion for Judgment on Partial Findings is GRANTED;

2. Plaintiff Leon Akselrad's Motion to Classify Witnesses as "Quasi Experts" is DENIED; and

Appendix C

3. Plaintiff Leon Akselrad's Motion for a Copy of the Trial Transcript at No Cost is DENIED.

JUDGMENT is ENTERED in this matter in favor of Defendants City of Philadelphia, Mayor Edward G. Rendell and Mary Rose Loney, and against Plaintiff Leon Akselrad.

BY THE COURT:

s/ James McGirr Kelly
JAMES McGIRR KELLY, J.

APPENDIX D — PLAINTIFF'S BRIEF DATED AND FILED APRIL 14, 1997 AND RESUBMITTED NOVEMBER 7, 1997

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No 96-5192

LEON AKSELRAD (PRO-SE)

Vs

CITY OF PHILADELPHIA ET AL

RESUBMITTED NOV 7, 1997

PLAINTIFFS BRIEF

LIST OF CHARGES

SABOTAGE BY CITY CONTRACTORS OF AIRPORT (PHL) SECURITY SYSTEM IN 1991 PRIOR TO GULF WAR.

CONTINUED SABOTAGE OF SECURITY SYSTEM BY INSTALLING INFERIOR PERFORMANCE SECURITY EXIT DOOR CIRCUITS IN THE TIME PERIOD OF 1993-1995.

PIRACY OF MY SECURITY DOOR INVENTION CONCEIVED WINTER 1993-1994 AND BUILT, TESTED BY APRIL OF 1994.

Appendix D

INSTALLATION OF SECURITY DOOR INVENTION WITHOUT INVENTORS EXPRESSED PERMISSION.

VIOLATIONS BY SUPERVISORS AND MANAGERS OF TITLE VII USC § 2000e-2.

THESE VIOLATIONS INCLUDED BUT NOT LIMITED TO, THE FOLLOWING:

RELIGIOUS HARASSMENT, SEXUAL HARASSMENT, DENIAL OF UNION REPRESENTATION, DENIAL OF TRAINING, ASSAULT, RETALIATION SEGREGATION DENIAL OF ACCESS TO EMPLOYEE BREAKROOMS WHILE CAMPAIGNING FOR UNION OFFICE.

TEMPORARY CONFISCATION AND REMOVAL FROM WORK PREMISES OF TOOL BOX USED IN PERFORMANCE OF MY JOB. CONFISCATION OF SECURITY BADGE OVER ALLEGED COMPLAINTS TO THE FAA OF CERTAIN SECURITY CONCERNS.

PLEASE SEE AFFIDAVIT AND STATEMENT OF CHARGES HANDLED BY THE EEOC AND FILED IN PRESENT CASE.

LEON AKSELRAD
s/ Leon Akselrad
PRO SE